ASIA COMMERCIAL FINANCE (M) BERHAD

v.

J.B. PRECISION MOULDING INDUSTRIES SDN BHD (IN LIQUIDATION)

FEDERAL COURT, KUALA LUMPUR
DATO' CHONG SIEW FAI CJ (SABAH & SARAWAK)
TAN SRI DATO' MOHD. AZMI KAMARUDDIN FCJ
DATO' WAN ADNAN ISMAIL FCJ
[CIVIL APPEAL NO. 02-750-93]
1 MARCH 1996

COMPANY LAW: *Winding-up - Lease agreement - Winding-up of lessee - Whether lessor a secured creditor - Whether lessor holding any "lien" on property of lessee - Whether there was debt existing at time of presentation of winding-up petition - Security deposit under agreement - Whether liable to be set off against amount owing - Waiver - Applicability - Whether there was undue preferential treatment of creditor - Bankruptcy Act 1967 s. 2 - Companies Act 1965 ss. 219(2), 293.*

COMPANY LAW: *Winding-up - Lease agreement - Memorandum of Deposit providing security for due performance by lessee of terms of agreement - Whether providing lessor with a "lien" - Default by lessee - Whether lessor a secured creditor - Memorandum not registered under Companies Act - Whether void - Companies Act 1965 ss. 108(1) & (3), 219(2) - Bankruptcy Act 1967, s. 2.*

On 16 August 1988, Asia Commercial Finance (M) Bhd. (the lessor) entered into a lease agreement with J.B Precision Moulding Industries Sdn Bhd (the lessee) whereby it let to the latter a moulding machine for 25 months at a rental of RM1,605 per month. The agreement provided that the rentals be paid on or before the 16th of each month and following that the first rental was paid by the lessee on instant date. Thereafter, pursuant to clause 11 of the agreement, the parties executed a "Memorandum of Security Deposit" wherefore the lessee paid the lessor RM26,691 being security deposit (inclusive of prepaid rent), for its due performance of the terms of the agreement. The Memorandum, however, was never registered by the parties.

On 2 December 1989, a winding-up petition was presented against the lessee and following that, on 4 April 1990, a winding-up order was made and a liquidator appointed. It was not in dispute that prior to the winding-up order, some 17 monthly rentals had been paid by the lessee. The evidence, nonetheless, showed that except for the first rental, all other rentals were paid after the stipulated times i.e after the 16th of each month.

On 11 September 1990, the liquidator demanded from the lessor the return of the security sum of RM26,691. The lessor contended that it was a secured creditor and so refused to comply. In due course the lessor also undertook to set off the security deposit against the amount outstanding under the agreement which, as of 4 August 1993, stood at RM33,518.28.

By originating motion dated 26 April 1993 the liquidator applied for the return of the security deposit, alleging that the lessor was not a secured creditor, and so, had to return the money for distribution under s. 292 of the Companies Act 1965, and further, that the lessor's act of setting off the security sum amounted to an undue preferential treatment of creditor and was therefore void under s. 293 of the same Act.

The learned Judge held that the Memorandum was not void despite its non-registration under s. 108(1) of the Companies Act, that the lessor was not a "secured creditor" as defined in s. 2 of the Bankruptcy Act because it did not hold a "lien" on the property of the lessee as security for a debt due, and that the purported set-off by the lessor of the sum RM26,691 under the Memorandum was an undue preferential payment to creditor under s. 293 of the Companies Act. In consequence the Court ordered the return of the security sum, wherefore the lessor appealed.

Held:

Per Chong Siew Fai CJ (Sabah & Sarawak) (delivering the judgment of the Court):

[1] The Memorandum of Security Deposit of 16 August 1988 need not be registered under s. 108 of the Companies Act 1965 as sub-paragraph (k) of s. 108(3) that applied to a document in the nature of the Memorandum did not come into effect until 25 September 1993, while the other sub-paragraphs of the said s. 108(3) in force at the material time had no application. The learned Judge was right in holding that the Memorandum was not void by reason of non-registration under s. 108(1) of the Companies Act 1965.

[2] In the context of the present case, bearing in mind that a winding-up order had been made, the question of whether there was an existing debt to constitute a "lien" to come within the term "secured creditor" as defined in s. 2 of the Bankruptcy Act 1967 must depend on whether there was any debt due to the lessor from the lessee at the time of the presentation of the winding-up petition, i.e. on 2 December 1989.

[3] Item 7 of the Schedule to the lease agreement stipulated that the 25 monthly rentals were to be paid on the 16th day of each month commencing from 16 August 1988. Thus the 15th rental payment should have been paid by 16 October 1989 and the 16th payment, by

16 November 1989. The facts showed that the 15th and 16th monthly rentals were not paid until 7 December 1989 and 13 January 1990 respectively. That being so, it is obvious that, by virtue of the deeming provision in s. 219(2) of the Companies Act, 1965, on the date of the presentation of the the winding-up petition on 2 December 1989, the lessee was owing the lessor at leasts 2 instalments of rentals. Therefore, there existed a debt owing by the lessee to the lessor on 2 December 1989. There was hence a "lien" within the terms of "secured creditor" under s. 2 of the Bankruptcy Act 1967, and the lessor was therefore a "secured creditor" on 2 December 1989. It follows that the trial Judge was wrong in holding that the lessor was not a secured creditor or that it did not hold any "lien" on the property of the lessee.

[4] Independent of the definition of "secured creditor" contained in s. 2 of the Bankruptcy Act 1967, the lessor was nonetheless entitled to hold the Memorandum of Deposit as security for payment of the arrears of instalment rentals owing. Going by the terms of the Memorandum the deposit was clearly placed as security for the performance of the terms and conditions of the lease agreement and was refundable at the expiry of the lease agreement but only upon the full satisfaction of all the terms and conditions therein contained.

[5] The argument that there was waiver or estoppel when the two late payments were accepted by the lessor is not sustainable. The question is whether there existed an unpaid debt on 2 December 1989. If it existed, as it actually did, any subsequent payment does not alter the fact of its existence at the material time.

[6] Clause 11.3 of the lease agreement stipulates that the lessor shall be entitled to apply the deposit against all arrears of rent upon the occurance of any of the events narrated in clause 12 thereof. *Inter alia*, the events referred to in the latter clause include (1) the default by the lessee in the payment of any sums payable under the lease (2) the failure to observe or perform any of the provisions of the lease (3) the going into liquidation and (4) if winding-up petition had been filed against the lessee. In the event, bearing in mind that a winding-up petition had been filed against the lessee, that a winding-up order had been made against it, and that the lessee had breached the terms of the lease agreement by defaulting on the rentals, it is clear that the lessor was entitled to hold the deposit of RM25,086 paid under the Memorandum of Security Deposit and the prepaid rental RM1,605 as security, and that the lessee was a secured creditor to the extent of the deposit and the prepaid rental i.e RM26,691.

[7] In view of the validity of the set-off aforesaid, there was no substance in the contention that there had been undue preference in favour of the lessor under s. 293 of the Companies Act 1965 rendering the set-off liable

to be avoided. The lessor was entitled to set-off the security sum against the amount owed by the lessee.

[Appeal allowed. Order of learned Judge set aside]

***[Bahasa Malaysia** Translation of Headnotes]*

***UNDANG-UNDANG SYARIKAT:** Penggulungan - Perjanjian pajakan - Penggulungan penerima pajakan - Samada pemberi pajakan merupakan pemiutang bercagar - Samada pemberi pajakan memegang apa-apa lien ke atas hartanah penerima pajakan - Samada terdapat hutang sedia ada pada waktu pengemukaan petisyen penggulungan - Deposit jaminan di bawah perjanjian - Samada boleh ditolak terhadap jumlah yang terhutang - Pelepasan - Samada terpakai - Samada terdapat layanan keutamaan yang tidak wajar terhadap pemiutang - Akta Kebankrapan 1967 s. 2 - Akta Syarikat 1965 ss. 219(2), 293.*

***UNDANG-UNDANG SYARIKAT:** Penggulungan - Perjanjian pajakan - Memorandum Deposit memperuntukkan wang jaminan bagi menjamin pelaksanaan terma-terma perjanjian oleh penerima pajakan - Samada memberikan pemberi pajakan suatu "lien" - Kemungkiran oleh penerima pajakan - Samada pemberi pajakan merupakan pemiutang bercagar - Memorandum tidak didaftarkan di bawah Akta Syarikat - Samada tak sah - Akta Syarikat 1965 ss. 108(l) & (3), 219(2) - Akta Kebankrapan 1967 s. 2.*

Pada 16 Ogos 1988, Asia Commercial Finance (M) Berhad (pemberi pajakan) telah memasuki suatu perjanjian pajakan dengan JB Precision Moulding Industries Sdn. Bhd. (penerima pajakan) di mana ia menyewakan kepada pihak terkemudian sebuah mesin acuan bagi tempoh selama 25 bulan pada kadar sewaan sebanyak RM1,605 sebulan. Perjanjian tersebut memperuntukkan bahawa sewaan-sewaan tersebut dibayar pada atau sebelum 16 haribulan setiap bulan dan berikutan itu sewaan yang pertama telah dibayar oleh penerima pajakan pada tarikh semasa itu. Selepas itu, selaras dengan fasal 11 perjanjian tersebut, pihak-pihak berkaitan telah menyempurnakan satu Memorandum Deposit Jaminan di mana penerima pajakan telah membayar kepada pemberi pajakan jumlah sebanyak RM26,691 sebagai deposit jaminan (termasuk sewaan yang dibayar terlebih dahulu), untuk perlaksanaan olehnya akan terma-terma perjanjian tersebut. Memorandum tersebut, namun begitu telah tidak didaftarkan oleh pihak-pihak tersebut.

Pada 2 Disember 1989, satu petisyen penggulungan telah dikemukakan terhadap penerima pajakan dan berikutan itu, pada 4 April 1990, satu perintah penggulungan telah dibuat dan penyelesai dilantik. Ianya tidak dipertikaikan bahawa sebelum perintah penggulungan itu, sewaan-sewaan bagi lebihkurang 17 bulan telah dibayar oleh penerima pajakan. Keterangan namun begitu, menunjukkan bahawa melainkan bagi sewaan yang pertama, kesemua sewaan

yang lain telah dibayar selepas tempoh masa yang ditetapkan i.e. selepas 16 haribulan setiap bulan.

Pada 11 September 1990, penyelesai telah menuntut daripada pemberi pajakan supaya dikembalikan jaminan sebanyak RM26,691. Pemberi pajakan bagaimanapun menegaskan bahawa ia adalah pemiutang bercagar dan dengan itu enggan untuk mematuhinya. Tidak lama selepas itu, pemberi pajakan juga berusaha untuk menolak deposit jaminan terhadap jumlah yang masih terhutang di bawah perjanjian yang mana, setakat 4 Ogos 1993, berada pada jumlah RM33,518.28.

Melalui usul pemula bertarikh 26 April 1993 penyelesai memohon untuk pengembalian deposit jaminan diatas, dengan mengatakan bahawa pemberi pajakan bukanlah pemiutang bercagar dan dengan yang demikian harus mengembalikan wang tersebut untuk pembahagian di bawah s. 292 Akta Syarikat 1965, dan selanjutnya, bahawa perbuatan pemberi pajakan menolak jumlah jaminan tersebut membawa kepada layanan keutamaan yang tidak wajar terhadap pemiutang dan adalah dengan itu tak sah di bawah s. 293 Akta tersebut.

Hakim yang bijaksana memutuskan bahawa Memorandum tersebut tidak terbatal sungguhpun ianya tidak didaftarkan di bawah s. 108(c) Akta Syarikat, bahawa pemberi pajakan bukannya "pemiutang bercagar"' sepertimana yang ditakrifkan oleh s. 2 Akta Kebankrapan kerana ia tidak memegang apa-apa "lien" ke atas hartanah penerima pajakan sebagai jaminan bagi hutang yang kena dibayar, dan bahawa penolakan yang dimaksudkan oleh pemberi pajakan bagi jumlah RM26,691 di bawah Memorandum tersebut adalah merupakan pembayaran keutamaan yang tidak wajar kepada pemiutang di bawah s. 293 Akta Syarikat. Akibat daripada itu, Mahkamah telah memerintahkan pemulangan jumlah jaminan tersebut. Pemberi pajakan dengan itu telah merayu.

Diputuskan:

Oleh Chong Siew Fai, HB (Sabah & Sarawak) (menyampaikan penghakiman Mahkamah):

[1] Memorandum Deposit Jaminan bertarikh 16 Ogos 1988 tidak perlu didaftarkan di bawah s. 108 Akta Syarikat 1965 kerana perenggan-kecil (k) s. 108(3) yang terpakai kepada suatu dokumen yang mempunyai sifat Memorandum tersebut tidak berkuatkuasa sehingga 25 September 1993, sementara perenggan-kecil yang lain dari s. 108(3) yang berkuatkuasa pada waktu yang material itu tidak terpakai. Hakim yang bijaksana betul dalam memutuskan bahawa Memorandum tersebut adalah tidak terbatal walaupun tidak didaftarkan di bawah s. 108(l) Akta Syarikat 1965.

[2] Dalam konteks kes semasa ini, memperingati bahawa suatu perintah penggulungan telah pun dibuat, persoalan samada terdapat hutang yang sedia ada bagi membentuk suatu "lien" untuk dirangkumi oleh terma "pemiutang bercagar" sepertimana yang ditakrifkan dalam s. 2 Akta Kebankrapan 1967 mestilah bergantung pada samada terdapatnya apa-apa hutang yang kena dibayar kepada pemberi pajakan oleh penerima pajakan pada waktu pengemukaan petisyen penggulungan, iaitu pada 2 Disember 1989.

[3] Perkara 7 dari Jadual kepada perjanjian pajakan tersebut menetapkan bahawa 25 sewaan-sewaan bulanan hendaklah dibayar pada hari ke 16 setiap bulan, bermula daripada 16 Ogos 1988. Dengan itu pembayaran sewaan yang ke 15 seharusnya telah dibuat pada 16 Oktober 1989 dan pembayaran yang ke 16 selewat-lewatnya pada 16 November 1989. Fakta menunjukkan bahawa sewaan-sewaan bulanan yang ke 15 dan ke 16 telah tidak dibayar sehingga 7 Disember 1989 dan 13 Januari 1990 masing-masingnya. Dalam keadaan yang sedemikian, ianya jelas bahawa, menurut peruntukan menganggap dalam s. 219(2) Akta Syarikat 1965, pada tarikh pengemukaan petisyen penggulungan pada 2 Disember 1989, penerima pajakan berhutang kepada pemberi pajakan sekurang-kurangnya 2 ansuran sewaan. Dengan yang demikian, wujud hutang yang masih terhutang oleh penerima pajakan kepada pemberi pajakan pada 2 Disember 1989. Dengan itu terdapat "lien" dalam maksud "pemiutang bercagar" di bawah s. 2 Akta Kebankrapan 1967 tersebut, dan pemberi pajakan adalah dengan itu merupakan "pemiutang bercagar" pada 2 Disember 1989. Ianya mengikut, bahawa Hakim perbicaraan adalah salah dalam memutuskan bahawa pemberi pajakan bukannya pemiutang bercagar atau bahawa ianya tidak memegang apa-apa "lien" ke atas hartanah penerima pajakan tersebut.

[4] Walaupun tanpa bergantung kepada definasi "pemiutang bercagar" yang terkandung di dalam s. 2 Akta Kebankrapan 1967, pemberi pajakan masih berhak untuk menganggap Memorandum Deposit tersebut sebagai jaminan bagi pembayaran tunggakan-tunggakan ansuran sewaan yang terhutang. Menurut terma-terma Memorandum tersebut deposit itu jelas diletakkan sebagai jaminan bagi pelaksanaan terma-terma dan syarat-syarat perjanjian pajakan tersebut dan boleh dikembalikan ketika tamatnya perjanjian pajakan tersebut tetapi hanya selepas kesemua terma-terma dan syarat-syarat yang terkandung di dalamnya dilaksanakan sepenuhnya.

[5] Hujahan bahawa terdapatnya pelepasan, atau estopel bilamana kedua-dua pembayaran lewat itu diterima oleh pemberi pajakan tidak boleh dipertahankan. Persoalannya adalah samada terdapatnya hutang yang belum dibayar pada 2 Disember 1989. Jika ianya terdapat, sepertimana sebenarnya berlaku disini, apa-apa pembayaran yang berikutan tidak mengubah hakikat kewujudan hutang tersebut pada waktu yang material itu.

[6] Fasal 11.3 perjanjian pajakan menentukan bahawa pemberi pajakan adalah berhak untuk menggunakan deposit tersebut terhadap kesemua tunggakan sewaan setelah berlakunya mana-mana dari peristiwa-peristiwa yang disebut dalam fasal 12 di situ. Antara lainnya, peristiwa-peristiwa yang dirujuk di dalam fasal yang terkemudian itu adalah termasuk (1) kemungkiran oleh penerima pajakan dalam pembayaran mana-mana jumlah yang kena dibayar di bawah pajakan tersebut; (2) kegagalan untuk mematuhi atau melaksanakan mana-mana dari peruntukan-peruntukan pajakan tersebut (3) mengalami penyelesaian dan (4) sekiranya petisyen penggulungan telah difailkan terhadap penerima pajakan. Oleh yang demikian, mengingati bahawa petisyen penggulungan telah difailkan terhadap penerima pajakan, bahawa perintah penggulungan telah dibuat terhadapnya, dan bahawa pemegang gadaian telah memungkiri terma-terma perjanjian pajakan tersebut dengan memungkiri terhadap bayaran sewaan ianya jelas bahawa pemberi pajakan adalah berhak untuk menahan deposit sebanyak RM25,086 yang telah dibayar di bawah Memorandum Deposit Jaminan dan sewaan yang dibayar terdahulu sebanyak RM1,605 sebagai jaminan, dan bahawa penerima pajakan adalah merupakan pemiutang bercagar sehingga kepada had deposit dan sewaan yang dibayar terdahulu, iaitu RM26,691.

[7] Memandangkan keesahan penolakan yang tersebut di atas, tidak terdapat substans dalam penegasan bahawa terdapat keutamaan yang tidak wajar memihak kepada pemberi pajakan di bawah s. 293 Akta Syarikat 1965 yang menjadikan penolakan tersebut boleh dielakkan. Pemberi pajakan adalah berhak untuk menolak wang jaminan terhadap jumlah yang terhutang oleh penerima pajakan.

[Rayuan dibenarkan. Perintah Hakim yang bijaksana diketepikan]

Cases referred to:

Lian Keow Sdn. Bhd. (in liquidation) & Anor. v. Overseas Credit Finance (M) Sdn. Bhd. & Ors. [1988] 2 MLJ 449 SC ***(refd)***

Re Perkins ex parte Mexican Santa Barbara Mining Company [1980] 24 QBD 613 CA ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, ss. 2, 41
Civil Law Act 1956, s. 4(1)
Companies Act 1965, ss. 219(2), 292, 293

For the appellant - John Clark Sumugod; M/s. Sidek, Teoh Wong & Dennis.
For the respondent - Ong Ban Chai; M/s. Ong Ban Chai & Co.

JUDGMENT

Chong Siew Fai CJ (Sabah & Sarawak):

In the High Court at Johore Bahru, the learned trial Judge ordered the appellant, Asia Commercial Finance (M) Sdn. Bhd. (hereinafter referred to as the lessor) to refund to the respondent, J.B. Precision Moulding Industries Sdn. Bhd. (in liquidation) (hereinafter referred as the lessee) a sum of RM26,691 (hereinafter referred to as the security sum), being the aggregate of security deposit RM25,086 and prepaid rental of RM1,605 (See [1994] 1 MLJ 734). Being dissatisfied with the decision, the lessor appeals.

The relevant facts may be summarised as follows:

(a) By an equipment lease agreement dated 16 August 1988 (hereinafter referred to as the lease agreement), the lessor let to the lessee a plastic moulding machine for 25 months from 16 August 1988 to 15 September 1990 at a monthly rental of RM1,605 payable on or before the 16th of each month commencing from 16 August 1988.

(b) Pursuant to Clause 11 of the lease agreement, the lessee deposited with the lessor the security sum as security for the due observance and performance by the lessee of the stipulations terms and conditions contained in the lease agreement. The amount RM25,086 deposited was evinced by a Memorandum of Security Deposit dated 16 August 1998.

(c) From the affidavit evidence, the lessee had paid 17 monthly rentals out of the 25-month lease, and, according to the lessor's Statement of Account Exh "ACF-4" (at page 85 of the Appeal Record) which was unchallenged, all these monthly rentals were paid after the agreed stipulated times i.e. later than the 16th of each month in which the rental was due and payable, except that for the first month which was paid on 16 August 1988.

(d) On 2 December 1989 a winding-up petition was presented against the lessee. On 4 April 1990, a winding-up order was made and a liquidator was appointed. On 11 September 1990 the liquidator demanded from the lessor the return of the security sum RM26,691. The lessor refused to comply contending that it was secured creditor within the meaning of the term under the Bankruptcy Act 1967 and the Companies Act 1965.

(e) There is no evidence that the lessee or the liquidator had at any time terminated the lease agreement. On the other hand the undisputed evidence shows that the liquidator had consented to the repossession of the moulding machine by the lessor on 22 December 1990 because of the lessee's default in paying the monthly rentals.

(f) According to the lessor (and this was uncontradicted), the amount due and owing by the lessee as at 4 August 1993 was RM33,518.28 inclusive of such miscellaneous items as insurance premium, costs of repossession, storage fee and so forth. The lessor thus set off the security deposit RM25,086 against the amount outstanding RM33,518.28.

By originating motion dated 26 April 1993 the liquidator applied in the name of the lessee for the return of the security sum RM26,691 alleging that the lessee not being a secured creditor had to return the security sum for distribution under s. 292 of the Companies Act 1965 and that the lessor's act of setting off the security amounted to an undue preferential treatment of creditor and was therefore void under s. 293 of the Companies Act 1965.

At the trial in the High Court, the learned trial Judge found:

(1) that the Memorandum of Security Deposit dated 16 August 1988 was not void against the liquidator of the applicant company" (i.e. the lessee);

(2) that the lessor did not qualify as a secured creditor as defined in s. 2 of the Bankruptcy Act 1967 which definition was applicable to the winding-up of companies; and

(3) that the set-off effected by the lessor on 4 August 1993 was void under ss. 223 and 293 of the Companies Act 1965.

The learned trial Judge accordingly ordered the return of the security sum to the liquidator of the lessee.

It is now necessary to consider the reasons upon which the learned trial Judge came to his findings.

(1) Validity of the Memorandum of Security Deposit

The point as to the requirement of registering the Memorandum of Security Deposit under s. 108 of the Companies Act 1965 was not raised before us. In any event, we agree with the learned trial Judge that the said Memorandum which was dated 16 August 1988 need not be so registered since sub-paragraph (k) of s. 108(3) that applied to a document in the nature of the said Memorandum did not come into effect until 25 September 1993 while the other sub-paragraphs of the said s. 108(3) in force at the material time on 16 August 1988 had no application. Accordingly, we accept that the said Memorandum is not void by reason of non registration under s. 108(l) of the Companies Act 1965.

(2) The lessor, a secured creditor?

The learned trial Judge held that the lessor was not a secured creditor as defined in s. 2 of the Bankruptcy Act, 1967 because it did not hold a "lien" on the property of the lessee or any part thereof as a security for

a debt due to it from the lessee. The term "secured creditor is defined in s. 2 of the Bankruptcy Act 1967 thus:

> 'secured creditor' means a person holding a mortgage, charge or lien on the property of the debtor or any part thereof as a security for a debt due to him from the debtor but shall not include a plaintiff in any action who has attached the property of the debtor before judgment

The learned trial Judge held that by virtue of s. 4(1) of the Civil Law Act and the principles laid down in *Lian Keow Sdn. Bhd. (in liquidation) & Anor. v. Overseas Credit Finance* 2 MLJ 449 SC, the definition of "secured creditors" in s. 2 of the Bankruptcy Act 1967 applied to the winding-up of Companies.

The learned trial Judge found that there existed no element of any debt due from the lessee to the lessor at the time when the Memorandum of Deposit dated 16 August 1988 was executed. Accordingly, the learned trial Judge held that the lessor did not hold a "lien" thereby falling within the definition of secured creditor, and could not therefore, be holding the Memorandum of Deposit as a security for a debt to qualify as a secured creditor. Consequently the purported set-off by the lessor the sum of RM26,691 under the Memorandum of Deposit was an undue preferential payment to creditor under s. 293 of the Companies Act 1965.

With respect, we do not agree. The Memorandum of Security Deposit dated 16 August 1988 was to secure the performance of the terms and conditions contained in the lease agreement by the lessee. It was also stated in the said Memorandum that the sum deposited was refundable (to the lessee) "... at the expiry of the said agreement and only on complete satisfaction of each and every term and condition contained therein". The "said agreement" relates to the lease agreement.

In the context of the present case, whether there was an existing debt to constitute a "lien" to come within the term "secured creditor" as defined in s. 2 of the Bankruptcy Act 1967 depends on whether there was any debt due to the lessor from the lessee at the time of the presentation of the winding-up petition, provided a winding-up order was made by the Court. This is because s. 219(2) of the Companies Act 1965 provides:

> In any other case the winding up shall be deemed to have commenced at the time of the presentation of the petition for the winding up.

It is essential that the debt must be due from the debtor (lessee) to the creditor (lessor). In *Re Perkins ex parte Mexican Santa Barbara Mining Company* [1890] 24 QBD 613 CA the company presented a bankruptcy petition against the debtor. It turned out that the debtor had obtained a judgment declaring that one of the registered shareholders of the company was a trustee of some of his shares for the debtor. The company was not bound to recognise trusts

of their shares and its articles of association provided that should have a first and paramount lien on all shares, and on the dividends thereon, for moneys due to, and liabilities subsisting with, the company from or on the part of the registered holder or holders thereof, or other person for the time being entitled thereto as against the company. It was held that the company had no lien upon the shares for the debt due to it from the debtor, and was not "secured creditor" of the debtor within the meaning of the Bankruptcy Act. On the term "secured creditor" which was defined as a person holding a mortgage, charge, or lien, on the property of the debtor, or any part thereof, as a security for a debt due to him from the debtor (which, so far as quoted above, was identical to the definition of the term in s. 2 of the Bankruptcy Act 1967 (Malaysia)), Lord Esher M.R. commenting on the words "from the debtor" said: (p. 619)

> We must give effect to those words. The question here is not whether this lien is a security to the company as against Dickey, but whether it is a security for a debt due to the company from the debtor. I think it cannot in fairness be said to be a lien in respect of a debt due to the company from the debtor, and, therefore, although in one sense it is a security in their hands, it is not such a security as makes them 'secured creditors' of the debtor within the meaning of the Act. This new definition shuts that lien out. Therefore, although I agree with the registrar that the company had a lien, I cannot agree that that lien, which was a lien against Dickey, was such a lien as made them "secured creditors" of the debtor, for the lien as against Dickey was not a security for a debt due to them from the debtor.

In our instant case, the winding-up order was made on 4 April 1990. By virtue of s. 219(2) of the Companies Act 1965, the winding-up was deemed to have commenced on the date of the presentation of the winding-up petition, that is, on 2 December 1989.

This brings us to the important question of whether the lessee was owing any debt to the lessor as at 2 December 1989 the date of the presentation of the winding-up petition.

The learned trial Judge in his judgment seemed to have found that nothing was owing on 2 December 1989. He said:

> There were attempts by the respondent's Counsel (i.e. Counsel for the lessor) to argue that subsequently a debt existed between the applicant company and the respondent when the applicant company defaulted in their rental payments. This would trigger off the memorandum of deposit and turn it into a lien with an element of a debt. However, this argument does not overcome the fact that when the debt came into existence presumably in December 1990 when the respondents repossessed the equipment, the petition for winding-up of the applicant company had already been presented and a winding-up order made. (brackets added)

With respect, there was, here, a failure to appreciate the evidence mainly owing to failure on the part of Counsel to bring to the attention of the learned trial Judge the material evidence on the instalment payments made. At the hearing of this appeal we pointed out, and Counsel for the lessee conceded, that from the Statement of Accounts exhibited by the lessor Exh. ACF-4, the 15 and 16 monthly rentals were not paid until 7 December 1989 and 13 January 1990, respectively. Item 7 of the Schedule to the said lease agreement stipulated that the 25 monthly rentals were to be paid on the 16th day of each month commencing from 16 August 1988 and thereafter, on the same day of each successive month. Thus the 15th rental payment should have been paid by 16 October 1989 and the 16th payment, by 16 November 1989. That being so, it is obvious that, by virtue of the deeming provision in s. 219(2) of the Companies Act, 1965, on the date of the presentation of the winding-up petition on 2 December 1989, the lessee was owing the lessor at least 2 instalments of rentals. Therefore, there existed a debt owing by the lessee to the lessor on 2 December 1989. Hence, there was a "lien" within the term of secured creditor" under s. 2 of the Bankruptcy Act, 1967 and the lessor was a "secured creditor" on 2 December 1989.

Counsel for the lessee argued that there was waiver or estoppel since those 2 instalments were accepted *albeit* paid late i.e. after the making of the winding-up order. We are unable to accept the contention. The question is whether there existed an unpaid debt on 2 December 1989. If it existed (as we find it did), the subsequent payment does not alter the fact of its existence at the material time i.e. 2 December 1989.

Furthermore, we are also of the view that independent of the definition of "secured creditor" contained in s. 2 of the Bankruptcy Act, 1967, the lessee was nonetheless entitled to hold the Memorandum of Deposit as security for payment of the arrears of instalment rentals owing. The material provision of the Memorandum of Security Deposit dated 16 August 1988 reads as follows:

> We the undersigned (meaning the Lessee) have this day deposited with you the sum of Ringgit Twenty Five Thousand & Eighty-Six only (RM25,086.) as security for the performance of the terms and conditions contained in the equipment lease agreement dated 16 August 1988.
>
> I/We agree that this deposit is refundable to me/us free of interest at the expiry of the said agreement **and only on complete satisfaction** of each and every term and condition contained therein. (the first set of brackets and the emphasis added).

Thus the deposit was placed as security for the performance of the terms and conditions of the lease agreement and was refundable at the expiry of the lease agreement but only upon full satisfaction of all the terms and conditions therein contained.

The relevant provisions of Clause 11.3 of the lease agreement stipulates as follows:

> 11. The Lessor shall be entitled simultaneously with the execution of this Lease Agreement to collect from the Lessee thereof a deposit or a prepaid rent as described in Item (6) of the Schedule as the Lessor shall in its absolute discretion decide and such deposit or prepaid rent will be retained by the Lessor and dealt with in the manner as follows:
>
> 11.1. ...
>
> 11.2. ...
>
> 11.3. Notwithstanding the provisions of sub-clauses 11.1 and 11.2 hereof if the Lessee is in default under any of the provisions of this Lease Agreement (including the events referred to in Clause 12 below) then the Lessor shall be entitled at its absolute discretion to apply the Deposit and/or Prepaid Rent or any part thereof against all and any monies damages arrears of Rent and/or Agreed Loss Value as the Lessor shall deem fit...

Clause 11.3 quoted above referred to the 'the events' enumerated in Clause 12 of the lease agreement. For the purpose of the present case under appeal, we need only single out 3 events i.e.:

(1) If the Lessee shall default in the payment of any sums payable under the Lease; or (Clause 12.1 (a))

(2) If the Lessee shall fail to observe or perform any of the provisions of this Lease; whether express or implied"; or (Clause 12.1 (b))

(3) if the Lessee... shall go into liquidation (whether voluntarily or compulsorily); or (Clause 12.1 (d))

(4) If winding-up petition shall be filed against the Lessee; or (Clause 12.1 (e)).

It is common ground that winding-up petition was filed against the lessee on 2 December 1989 and a winding-up order had been made against it on 4 April 1990 (Clause 12.1 A and (e)). It is also obvious that the lessee had breached the terms of the lease agreement through default on its part in making payment of the monthly rentals (clause 12.1 (a) and (b)). In the circumstance and having regard to the provisions contained in clause 11.3 read with the events specified in Clause 12.1 (a), (b), (d) and (e) quoted above, it is, in our view, clear that the lessor was entitled to hold the deposit RM25,086 paid under the Memorandum of Security Deposit dated 16 August 1988 and the prepaid rental RM1,605 as security, and that the lessee was a secured creditor to the extent of the deposit and the prepaid rental i.e. RM26,691.

(3) Undue preference and avoidance of set-off

In the light of our finding as to the validity of the set-off, we find no substance in the contention of the lessee that there had been undue preference in favour of the lessor under s. 293 of the Companies Act, 1965 rendering the set-off liable to be avoided. Nor do we find it necessary to invoke s. 41 of the Bankruptcy Act, 1967. As we have stated earlier, the lessor was entitled to set-off the security sum against the amount owed by the lessee to the lessor.

For the above reasons, we allow the appeal. The order of the learned trial Judge made on 8 December 1993 is set aside. The motion is dismissed with costs here and below to be paid out of the assets of the lessee, JB Precision Moulding Industries Sdn. Bhd. In the absence of an agreement, such costs may be taxed.

Reported by W.A. Sharif